No. 78-5705

Supreme Court, U. S.
FILED
JAN 17 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

OTIS TRAMMEL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JOEL M. GERSHOWITZ
Attorneys
Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5705

OTIS TRAMMEL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 583 F. 2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1978. The petition for a writ of certiorari was filed on November 13, 1978, and is therefore out of time under Rule 22(a) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a wife who participated in a conspiracy to import heroin should have been permitted to testify against her husband and others at their joint trial over the objection of the husband.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner and two others, Joseph Freeman and Edwin Lee Roberts, were convicted of importing heroin in violation

of 21 U.S.C. 952(a) and 18 U.S.C. 2, and conspiring to commit that offense in violation of 21 U.S.C. 962(a) and 963. Petitioner was given an indeterminate sentence pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010(b). 1/ The court of appeals affirmed, one judge dissenting (Pet. App. 1-10).

1. The evidence at trial showed that petitioner, codefendants Joseph Freeman and Edwin Lee Roberts, petitioner's wife Elizabeth, and Janice Keenan, all neighbors at an Air Force base in Manila, participated in a scheme to obtain heroin from Thailand and transport it via Manila into the United States. In late August 1975, petitioner's wife went to Thailand at petitioner's behest to obtain a quantity of heroin (III Tr. 120) and returned with it to the Philippines, where she gave it to her husband (III Tr. 122-123). Two days later petitioner and his wife flew to Los Angeles with the heroin secreted on the latter's body (III Tr. 124-125). Once there, petitioner's wife returned the heroin to him and subsequently observed him distribute some of it (III Tr. 126).

Petitioner and his wife then joined codefendant Freeman, and the three of them went to San Bernardino to seek a buyer for the remaining heroin (III Tr. 130). Freeman thereafter flew to Virginia, where codefendant Roberts, who had gone there to retrieve a package of heroin he had directed Keenan to mail in the Philippines (III Tr. 21-22), assisted him in disposing of what remained of the drug (GX 2) for $5,000 (GX 3). Freeman then returned to California, where he gave petitioner $3,500 (III Tr. 133-134).

1/ Roberts and Freeman, who were also convicted, were sentenced, respectively, to two years' imprisonment and an indeterminate term under the Youth Corrections Act.

Thereafter petitioner's wife flew to the Philippines with Freeman and a few days later embarked for Thailand, where she obtained another quantity of heroin (III Tr. 135-137). Upon arriving back in the Philippines, she turned the heroin over to Freeman, who later returned it to her for transportation to the United States with instructions to deliver it to Roberts in Colorado Springs (III Tr. 138-140). During a customs search in Hawaii, however, the heroin was discovered on her person and she was arrested. She then agreed to cooperate with the authorities and continue her trip to Colorado (III Tr. 81, 91, 142). There, at the direction of Drug Enforcement Administration agents, she met with Roberts and delivered the heroin. Immediately thereafter DEA agents arrested Roberts (III Tr. 68-145).

2. Prior to trial petitioner moved to sever his trial from that of Roberts and Freeman, or in the alternative, to prevent his wife from testifying against him on the ground that the marital privilege prevents one spouse from giving testimony adverse to the other without his or her consent. The district court denied this motion; at trial petitioner's wife and Janice Keenan, both of whom had been granted immunity from prosecution under the federal immunity statute, 18 U.S.C. 6001-6005, were key government witnesses upon whom the case against petitioner and his codefendants largely depended. The district court did, however, exclude all evidence of confidential communications between petitioner and his wife.

ARGUMENT

The sole issue in this case is whether petitioner could use the marital privilege to prevent his wife, a participant in the illegal drug scheme charged, from testifying to his role in the scheme at his joint trial with two other participants.

In Hawkins v. United States, 358 U.S. 74 (1954), this Court reaffirmed the validity of the evidentiary rule that ordinarily permits a party to exclude the testimony of his spouse. In that case the wife of the defendant testified over his objection in a prosecution for transporting a woman in interstate commerce for purposes of prostitution in violation of the Mann Act, 18 U.S.C. 2421. In concluding that it was error to permit the wife to testify, this Court said (358 U.S. at 77, 79):

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well ***.
>
> [T]here is still a widespread belief grounded in present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences***.
>
> [H]owever, this decision does not foreclose whatever changes in the rule may eventually be dictated by "reason and experience."

Rule 501 of the Federal Rules of Evidence similarly provides that the privilege of a witness "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

Accordingly, the privilege against adverse testimony by a spouse is not absolute and, like any rule, is not to be applied mechanically. Rather, it must be construed in accord with its basic purpose--to foster family peace for the benefit of the public as well as the family. Thus, the privilege generally may not be invoked in prosecutions for crimes committed by one spouse against the other. Wyatt v. United States, 362 U.S. 525 (1960). It is also inapplicable in the case of crimes committed by one spouse against the children of either (United States v. Allery, 526 F. 2d 1362 (8th Cir. 1975)) and in actions

by one spouse against an outsider for an intentional injury to the marital relation. United States v. Cameron, 556 F. 2d 752, 756 (5th Cir. 1977)(dictum).

Reason and experience also support an exception when both spouses participate in a criminal conspiracy with others. First, in such circumstances, the public interest in securing the testimony of one of the spouses is greater than it is in the case of a crime committed by a single actor: for "collective criminal agreement" is recognized as in itself a serious danger to the public. Callanan v. United States, 364 U.S. 587, 593-594 (1961). See also Jeffers v. United States, 432 U.S. 137, 157 (1977)(plurality opinion). Second, the spouse of an accused criminal conspirator could testify concerning the conspiracy in the trial of the co-conspirators if the trial were severed from that of the defendant spouse, even though such testimony might publicly reveal the defendant spouse's role in the conspiracy and thereby pose at least some risk of disrupting marital harmony. In re Snoonian, 502 F. 2d 110, 112 (1st Cir. 1974); 8 Wigmore, Evidence § 2234 (1961 McNaughton rev.). Thus the question is not whether to permit a risk to marital harmony by allowing a spouse to reveal the other spouse's role in a conspiracy but rather how great a risk is acceptable. Finally, at least one of the justifications for the privilege is less compelling when spouses are accused of joint participation in criminal activity, for in such circumstances the marriage can hardly be said to function as "an important institution contributing to the rehabilitation of the defendant spouse." United States v. Van Drunen, 501 F. 2d 1393, 1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). In sum, the interests served by the privilege generally do "not justify assuring a criminal that he can enlist the aid of his spouse in a criminal

enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness." United States v. Van Drunen, supra, 501 F. 2d at 1396. Cf. Lutwak v. United States, 344 U.S. 604, 613-615 (1953).

This crime exception accords with exceptions to other privileges where there is participation in crime. Thus it has long been held that a client who uses his attorney to obtain guidance in the commission of a crime is not protected by the attorney-client privilege from the risk that his attorney will be called to testify about their conversations. See Clark v. United States, 289 U.S. 1, 15 (1933); Hyde Construction Co. v. Koehring Co., 455 F. 2d 337, 342 (5th Cir. 1972); United States v. Bob, 106 F. 2d 37, 40 (2d Cir. 1939), cert. denied, 308 U.S. 589 (1939). Indeed, as to the related privilege based on the marital relationship covering confidential communications between spouses, it has been held that the privilege does not apply to marital communications having to do with the commission of a crime and not with the privacy of the marriage. See United States v. Mendoza, 574 F. 2d 1373, 1379-1381 (5th Cir. 1978); United States v. Kahn, 471 F. 2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973) (cross-petition raising marital privilege issue), reversed on other grounds, 415 U.S. 143 (1974). 2/

2/ Ivey v. United States, 344 F. 2d 770 (5th Cir. 1965) and Peek v. United States, 321 F. 2d 934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964), cited in both the majority and dissenting opinions below, do not aid petitioner's cause. In Ivey (344 F. 2d at 772), the court held that "reason and experience" did not warrant the admission of Mrs. Ivey's extra-judicial statement, given the circumstances, among others, that the statement was contradicted by her courtroom testimony and was made while she was under the influence of a narcotic. In Peek, (321 F. 2d at 942-943), the court found no abuse of discretion in the trial court's denial of a pretrial motion for severance that was based on the possibility that the government would use statements in violation of the marital privilege. While the Fifth Circuit did hold in United States v. Williams, 447 F. 2d 894, 897-898 (5th Cir. 1971), also

(Continued on page 7)

In short, this privilege, like others, "takes flight if the relation is abused," Clark v. United States, supra, 289 U.S. at 15, and it is abused where both spouses participate with others in a criminal scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JOEL M. GERSHOWITZ
Attorneys

JANUARY 1979

2/ (Continued from page 6)
cited below, that the marital privilege prevented the admission of extra-judicial statements made by Mrs. Williams incriminating her co-conspirator husband, the current validity of that decision is in doubt in view of the Fifth Circuit's recent opinion in United States v. Mendoza, supra. There, in holding that extra-judicial statements of one spouse made in furtherance of a conspiracy are admissible against the other, the court indicated that the privilege is to be narrowly construed by weighing the need for truth against the importance of the policy sought to be furthered by the privilege" and considering "the likelihood that recognizing the privilege in the factual setting of [the] case will in fact further that policy, and, if so, how much." Id. at 1381.